Supreme Court, U.S.
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No. 10-56

IN THE

Supreme Court of the United States

REINAUER TRANSPORTATION COMPANIES, LLC *et al.*,

Petitioners,

v

GEORGE BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, THIRD JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

JAMES ALEXANDER BURKE
LARKIN, AXELROD, INGRASSIA
& TETENBAUM, LLP
356 Meadow Avenue
Newburgh, New York 12250
(845) 562-3366
jburke@laitlaw.com

Counsel for Respondent

COUNSEL PRESS
(800) 274-3321 (800) 359-6859

QUESTIONS PRESENTED

1. Whether the Court should accept Petitioners' invitation to use this case as a vehicle to overturn *Rogers v. Missouri Pacific Railway Co.*, 352 U.S. 500 (1957), *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957), and every one of the federal circuits, and hold that FELA and Jones Act plaintiffs must prove causation under the principles of traditional common law proximate cause rather than under the relaxed standard acknowledged by this Court in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), where

(a) Petitioners never objected to Respondent's invocation of the *Rogers/Ferguson/Gottshall* relaxed standard of causation on his motion for summary judgment, and conceded in the New York Appellate Division that this relaxed standard governed the liability issues in this case;

(b) at the trial on damages only, the critical issue was not common law proximate cause, but instead whether Respondent suffered, as he claimed, from reflex sympathetic dystrophy (RSD) resulting from his accident and ensuing surgeries, or, as Petitioners claimed, from pre-existing medical conditions for which they bore no responsibility;

(c) Petitioners' requested jury instructions on causation were clearly erroneous in

that they would have imposed on Respondent the burden to prove not only that Petitioners' negligence caused RSD but also that his pain and disability did not result from any other condition, in contravention of the FELA / Jones Act rule, acknowledged even by Justice Souter concurring in *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158 (2007), that Petitioners are liable for an injury with multiple cognizable causes so long as the injury resulted "in whole or in part" from their negligence;

(d) Petitioners never raised Judge Souter's Sorrell concurrence either in the trial court or in the Appellate Division, and in the Appellate Division attacked the jury instructions not on the proximate cause grounds advanced in their petition for certiorari, but only on the ground that there was no charge on apportionment of damages; and

(e) as the New York Appellate Division correctly held, Petitioners failed to preserve for review its claim of error with regard to apportionment of damages.

2. Whether Petitioners have presented compelling reasons to reexamine the longstanding and nearly universal consensus, articulated by this Court over 50 years ago in *Rogers v. Missouri Pacific Railway Co.*, 352 U.S. 500 (1957) and *Ferguson v.*

Moore-McCormack Lines, Inc., 352 U.S. 521 (1957), and more recently acknowledged in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), that the FELA and Jones Act establish a relaxed standard of causation, where

(a) the federal circuits have all adopted a relaxed standard and rejected the use of traditional formulations of proximate cause in FELA and Jones Act cases;

(b) the purported conflict among a few lower courts is not meaningful and does not require attention from this Court; and

(c) under the principles of *stare decisis*, Congress' longstanding acquiescence in the courts' construction of the FELA and Jones Act as establishing a relaxed standard of causation militates heavily in favor of respecting this now well-established authority and against adopting a common law standard of proximate cause in FELA and Jones Act cases.

3. Whether Petitioners have presented compelling reasons for this Court to review the New York Appellate Division's holding that Petitioners were correctly found negligent *per se*, pursuant to *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958) and its progeny, for violating Coast Guard regulation 46 CFR 42.15-75(d), which requires that "[s]atisfactory means (in the form of guard rails, life

lines, gangways or underdeck passages, etc.) shall be provided for the protection of the crew in getting to and from their quarters, the machinery space and all other parts used in the necessary work of the vessel", where

(a) Respondent's maritime expert made a highly detailed demonstration that a fixed rung ladder with a dangerous *de facto* handrail which broke off in Respondent's hand, causing him to fall and sustain injury, did not provide satisfactory means for seamen to descend from the deckhouse roof of Petitioners' barge;

(b) the New York courts correctly recognized, contrary to Petitioners' assertion, that Respondent's expert did not opine that ANSI standards governing fixed ladders were legally binding or that Petitioners were negligent *per se* because they had violated ANSI standards;

(c) Petitioners never argued in the trial court that Section 42.15-75(d) was insufficiently specific to support a finding of negligence *per se*; and

(d) in opposition to Respondent's showing, Petitioners' expert proffered without so much as a scintilla of supporting evidence only his bare, conclusory one-sentence "say so" that the instrumentality was "suitable for its intended purpose."

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STATEMENT OF THE CASE

Respondent seaman George Brown worked for the Reinauer Transportation Companies for over 30 years. From 1978 on, he was a barge captain, and from 1992 captained barges carrying over 6 million gallons of petroleum. In 1999 and 2000, he and his crew received Reinauer's "Mariner's Award" for excellence in safety and compliance, performance, communication, maintenance of the deck and engine, and crew capability. He loved working on the ocean, never missed a day of work, and had an excellent work record.

On July 21, 2003, Brown sustained serious personal injuries when he fell 8 - 10 feet as he attempted to descend a fixed rung ladder from the deckhouse roof of Reinauer's barge RTC 502. His fall was precipitated by the breaking of the ladder's *de facto* handrail – a pole located within the rungs of the ladder and extending above the level of the roof. Suing under the Jones Act, 46 U.S.C. § 688, Brown established Reinauer's negligence *pe se* and his entitlement to summary judgment on liability via a highly detailed demonstration by his maritime expert, David Cole, that the ladder and appurtenant *de facto* handrail were defective in multiple respects and violated Coast Guard regulation 46 CFR 42.15-75(d). In summary, Mr. Cole demonstrated that:

> The fixed ladder attached to the deckhouse bulkhead did not provide satisfactory means for the protection of the crew in getting to and from the deckhouse roof in the necessary work of

> the RTC 502. Ascending and especially descending the ladder was awkward and unsafe because the grab bar did not extend to a sufficient height above the deckhouse roof, and the top rung of the ladder was too far below the edge of the roof. In addition, there was an unsafe *de facto* handrail running inside the ladder rungs on the right side of the ladder and extending above the deckhouse roof. This *de facto* handrail, consisting of a beige pipe into the top of which was fitted a black pole that formerly held an antenna, constituted a trap, for (a) the black pole was readily accessible and available to be used as a handhold, but (b) this *de facto* handrail was unsafe in that (i) the means by which the black pole was connected into the beige pipe was not sufficiently secure, and (ii) the connecting parts of the *de facto* handrail were negligently maintained and in a corroded state at the time of the accident.

(App. 60a-61a)

On the issue of causation, Reinauer *never objected* to Brown's contention, based on *Rogers v. Missouri Pacific Railway Co.*, 352 U.S. 500 (1957) and its progeny, that the Jones Act established a relaxed standard of causation, and that he need only demonstrate that Reinauer's "negligence played any part, even the slightest, in producing the injury or death for which damages are sought." (R. 1094-95a,

1098a-1107a). Indeed, *Reinauer expressly conceded on appeal that this relaxed standard was applicable to the determination of its liability under the Jones Act.* (Appellate Division Brief, p. 76)

The case went to trial on damages only. Brown contended that in consequence of his fall and ensuing six (6) surgeries, he developed reflex sympathetic dystrophy (RSD); that he has suffered years of excruciating pain; that he will continue for the rest of his life to suffer this pain, only partially ameliorated by narcotic medication and a spinal cord stimulator implanted in his buttocks; and that he is permanently and totally disabled. Reinauer contended that Brown's pain and disability resulted not from RSD but from other medical conditions including a claimed pre-existing peripheral neuropathy allegedly caused by alcohol abuse or diabetes. (Pet. 11-12, 33)

Reinauer sought jury instructions on causation which would have (a) eliminated any reference to Jones Act statutory language making it responsible for injury "resulting in whole *or in part*" from its negligence, and (b) imposed on Brown the burden to prove not only that his pain and disability was caused by RSD resulting from Reinauer's negligence, but also that such pain and disability was not caused by any other condition, including the alleged pre-existing peripheral neuropathy. (Pet. 12 n.5, 15; App. 170a, 176a) Reinauer's proposed jury instructions on causation were erroneous on multiple counts.

First, Reinauer's proposed instructions were inconsistent with the longstanding and nearly universal view, articulated by this Court over 50 years

ago in *Rogers*, more recently acknowledged in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), and adopted by all of the federal courts of appeal, that the FELA and Jones Act establish a relaxed standard of causation pursuant to which Jones Act defendants are liable for injury "resulting in whole *or in part*" from their negligence.

Second, the requested instructions were inconsistent even with the narrower interpretation of *Rogers* advanced by former Justice David Souter, concurring in *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158 (2007). Under this view, *Rogers* did not determine whether common law proximate cause is required by the FELA, but held that FELA defendants are liable for an injury with multiple cognizable causes so long as the injury resulted "in whole *or in part*" from their negligence. The present case falls squarely under this heading: as the Petition acknowledges, the critical issue framed by the parties at trial was not proximate cause, but whether Brown's pain and disability was caused by RSD resulting from his fall and ensuing surgeries, or from pre-existing peripheral neuropathy. (Pet. 11-12, 33)

Third, the requested instructions contravened the law on apportionment of damages, pursuant to which (a) it is the defendant's burden to prove that the plaintiff had a pre-existing condition as well as the extent of the damages that any pre-existing condition would inevitably have caused, and (b) if the jury is unable to separate the pain and disability caused by the pre-existing condition, then it should be instructed to hold the defendant liable for all of plaintiff's injuries.

After a hard fought jury trial of three weeks' duration on damages only, the jury awarded Brown approximately $1.1 million dollars for loss of earnings, $400,000 dollars for future medical expenses, and $3.5 million dollars for pain and suffering. The judgment was unanimously affirmed on appeal, and the New York Court of Appeals denied leave to appeal.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR REEXAMINING THE QUESTION OF THE PROPER STANDARD OF CAUSATION UNDER THE FELA AND JONES ACT

A. The Jones Act

"Under the Jones Act, seamen are afforded rights parallel to those of railway employees under the Federal Employers' Liability Act ("FELA"). 46 U.S.C. § 688. Section 51 of the FELA provides, in pertinent part, that '[e]very common carrier by railroad ... shall be liable in damages ... for such injury or death *resulting in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier.' 45 U.S.C. § 51...." *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997). Therefore, under the Jones Act, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957) (quoting *Rogers*, 352 U.S. at 506).

B. Petitioners Conceded In State Court That A Relaxed Standard Of Causation Governed The Liability Issues In This Case

Moving for summary judgment on Petitioners' liability under the Jones Act, Respondent explicitly argued that the Jones Act established a relaxed burden of proof on the issue of causation:

> "The Jones Act carries with it a substantially relaxed quantum of proof required to establish causation. That is, *plaintiff need only demonstrate that defendant's 'negligence played any part, even the slightest, in producing the injury or death for which damages are sought.' Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 523 ... (1957)..."

(R. 1094a) Petitioners *never objected* to the application of this relaxed standard of causation. (R. 1098a-1107a) On appeal, they *expressly conceded* that it was applicable to the determination of liability issues, acknowledging that the statutory provision making FELA / Jones Act defendants liable for "injury or death *resulting in whole or in part* from" their negligence meant that Petitioners could be held liable "for risks that would otherwise be too remote to support liability at common law." (Appellate Division Brief, p. 76)

Thus, Petitioners have failed to preserve for this Court's review any question concerning the standard of causation for liability under the Jones Act.

C. At The Trial On Damages Only, The Critical Issue Was Not Proximate Cause, But Instead Which Of Multiple Cognizable Causes – RSD Resulting From The Accident And Ensuing Surgeries Or Alleged Pre-Existing Medical Conditions – Was The Cause Of Respondent's Pain And Disability

Petitioners seeks to raise in this Court the question whether the Jones Act imposes on injured seamen the burden of establishing proximate cause in accordance with traditional common law principles. However, the trial in this case was on damages only, and, as Petitioners acknowledge, the critical issue was not proximate cause, but rather, which of multiple alleged medical conditions was the cause of Respondent's pain and disability: RSD resulting from his accident and ensuing surgeries, as Respondent claimed, or pre-existing medical conditions including peripheral neuropathy allegedly resulting from alcohol abuse or diabetes, as Petitioners claimed. (Pet. 11-12, 33) In this context, Petitioners sought a jury instruction on causation phrased in the following terms:

> To award any damages for an injury consequence, including damages for economic loss and pain and suffering, you must find that there is a direct and unbroken chain of causation between the injury and the consequence alleged, including RSD, exists [sic] and was caused by hip injury or hip surgery other than for the removal of a lipoma.

> *But you must also determine that his pain and disability, if he has any, is not the result of any other condition, such as peripheral neuropathy caused by alcohol abuse or diabetes; or by inappropriate use of narcotic pain medications.*

(Pet. 12 n.5, 15; App. 170a, 181a) This proposed instruction was clearly erroneous, and no claim of error may be predicated on the trial court's refusal to give it.

D. Petitioners' Requested Jury Instructions On Causation Were Flatly Inconsistent With The FELA And Jones Act, Even As Construed By The Concurring Justices In *Norfolk Southern Railway Co. v. Sorrell*

Petitioners' application for certiorari is predicated on Justice Souter's concurrence in *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158 (2007), which they never so much as mentioned in the trial court or in the New York Appellate Division. However, their proposed jury instructions on causation were flatly inconsistent not only with the nearly universal consensus of the courts that the FELA and Jones Act establish a relaxed standard of causation (*See*, Point II), but even with Justice Souter's narrower reading of *Rogers*' holding with respect to the statutory "in whole or in part" language. Therefore, under longstanding New York jurisprudence, no claim of error may be predicated on the trial court's refusal to give Petitioners' seriously

flawed instructions. *See, Hunt v. Bankers and Shippers Ins. Co. of New York*, 50 N.Y.2d 938, 409 N.E.2d 928 (N.Y. 1980); *Hamilton v. Eno*, 81 N.Y. 116, 1880 WL 12460 (N.Y. 1880).

1. *Rogers v. Missouri Pacific Railway Co.* Squarely Rejects The Notion Of Proximate Cause Embodied In Petitioners' Requested Jury Instructions

In *Rogers*, this Court rejected the application in FELA cases (and therefore in Jones Act cases) of the notion of proximate cause embodied in Petitioners' requested jury instructions.

The *Rogers* Court castigated the court below for deciding that:

> *there is no jury question in actions under [FELA], although the employee's proofs support with reason a verdict in his favor, unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected*, or, stated another way, unless his proofs are so strong that the jury, on grounds of probability, may exclude a conclusion favorable to the defendant.

Id. at 505 (emphasis added). Holding as error this notion that FELA/Jones Act plaintiffs are required to affirmatively exclude "causes with which the defendant was not connected" – which is precisely

what Petitioners were demanding of Respondent here – the *Rodgers* Court wrote:

> That is not the governing principle defining the proof which requires a submission to the jury in these cases. The Missouri court's opinion implies its view that this is the governing standard by saying that the proofs must show that "the injury would not have occurred but for the negligence" of his employer, and that "[t]he test of whether there is causal connection is that, absent the negligent act the injury would not have occurred." That is the language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury.
>
> *Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes,* including the employee's contributory negligence.... The statute expressly imposes liability upon the employer to pay damages for

> injury or death due "in whole or in part" to its negligence.

Id., 505-507 (emphasis added).

2. Justice Souter's *Sorrell* Concurrence

In his *Sorrell* concurrence, Justice Souter agreed that the *Rogers* Court had "instructed courts how to proceed when there are multiple cognizable causes of an injury." *Norfolk Southern Railway Co. v. Sorrell*, *supra*, 549 U.S. at 173. He wrote:

> We granted certiorari in *Rogers* to establish the test for submitting a case to a jury when the evidence would permit a finding that an injury had multiple causes. 352 U.S. at 501, 506... We rejected Missouri's "language of proximate causation which ma[de] a jury question [about a defendant's liability] dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." *Id.* at 506.... *Recovery under the statute is possible, we said, even when an employer's contribution to injury was slight in relation to all other legally cognizable causes.*

Id. at 174-175 (emphasis added).

3. Petitioners' Proposed Jury Instructions On Causation Were Plainly Erroneous, And Hence No Claim Of Error May Be Predicated On The Trial Court's Refusal To Give Them

Petitioners' requested jury instructions on causation contravened basic FELA/Jones Act principles articulated by this Court in *Rogers*, and acknowledged even by Justice Souter in his *Sorrell* concurrence. Petitioners complain (Pet. 12 n.5, 15) that the trial court refused proposed jury instructions that would have required Respondent to prove not only that there was a causal relationship between his fall or ensuing hip surgery and his claimed RSD, but also that "his pain and disability, if he has any, is not the result of any other condition, such as peripheral neuropathy caused by alcohol abuse or diabetes; or by inappropriate use of narcotic pain medications." (App. 170a, 181a) However, those proposed instructions (1) erroneously eliminated all reference to the statutory language making Petitioners responsible for "injury or death *resulting in whole or in part* from" their negligence, and (2) erroneously required Respondent to prove not only that Petitioners' negligence caused RSD, but also that his pain and disability did not result from any other "causes with which the defendant was not connected" in plain contravention of the holding of *Rodgers* even as narrowly construed by Justice Souter.

The rule of law in New York is that "it is not error for the court to refuse to charge any request unless such request is in all respects correct. The

court is not called upon to dissect a request, eliminating that which is not sound and charging the remainder, nor is it bound to make changes in a request, but it should take the request as a whole, and charge it if it is correct, and, if not, refuse to charge it; and, if the request as a whole is not correct, no error can be predicated from the refusal of the court to charge it." *Cobb v. Metropolitan St. Ry. Co.*, 56 A.D. 187, 67 N.Y.S. 644, 646 (1st Dept. 1900) (citing *Hamilton v. Eno*, 81 N.Y. 116, 127, 1880 WL 12460 at *7 (N.Y. 1880). *See, Dooling v. City of New York*, 148 A.D. 713, 132 N.Y.S. 1012, 1014 (2d Dept. 1912).[1]

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[1] Petitioners allege (Pet. 13, 33) that Respondent's trial counsel exploited what it contends was an erroneous charge on causation when he argued in summation that "George was in pain and that's all you have to decide." Not so. As Respondent's counsel also noted, both parties had framed the case in those terms, and Petitioners' counsel acknowledged that this was indeed "the critical issue in the case." (App. 126a)

Dr. Sidney Bender, Respondent's neurological expert, testified at trial that Respondent's positive response to lumbar sympathetic blocks and to the spinal stimulator was diagnostic of RSD. (R 747, 1851-52, 1859-60, 1864) Under questioning by Petitioners' counsel, he acknowledged that the critical question was the genuineness of Respondent's complaints of pain:

> Q Now, you realize, of course, that the critical question is to what extent, if at all, the pain complaints are genuine, right?
>
> A Yes. (R. 747)

Petitioners' neurological expert, Dr. Samuel Rapaport, opined that Respondent was suffering from an alcoholic or diabetic neuropathy, or from another medical condition called meralgia paresthetica. However, he concurred that the critical question was the genuineness of Respondent's complaints of pain:

> Q So if the jury does believe at the end of this case that he has got pain, big league pain in his thigh, it's not from meralgia paresthetica, correct?
>
> A Correct.
>
> Q It's not from alcoholic neuropathy, correct?
>
> A Right.
>
> Q And it's not from diabetic neuropathy, correct?
>
> A Correct.
>
> Q It's from something else, right?
>
> A Right. (R 2095-96)

So the jury would not miss the import of this testimony, Petitioners' counsel summed up the point in the very last question before the case went to the jury:

> Would you agree in this case, Doctor, as was said by Doctor Bender, the critical issue is whether or not George Brown has the complaints of pain he claims? (R 2096)

E. Petitioners Did Not Appeal On The Proximate Cause Grounds Advanced In Its Petition For Certiorari, But Instead On The Ground That There Was No Instruction On Apportionment Of Damages, Concerning Which The New York Appellate Division Correctly Held That Petitioners Had Failed To Preserve Its Claim Of Error For Review

On appeal to New York's Appellate Division, Petitioners never raised the proximate cause arguments presented in its petition for certiorari. Its attack on the trial court's jury instructions was addressed instead to the absence of a charge on *apportionment of damages*. (Appellate Division Brief, Point III, pp. 73-79) Petitioners cited *Rogers* for the principle that "once reasonable minds might conclude that the employer's negligence was even slightly related to the injury complained of, a jury case has been made out, and this conclusion is not altered by the fact that damages may be reduced by the fact that the damages were caused by other factors, including contributory negligence." It then argued:

> "Courts have consistently held, based upon the rationale of *Rogers, supra*, that FELA and Jones Act defendants are liable solely for the damages they cause, and to the extent other causes combine to disable a plaintiff, that *apportionment of damages is required.*"

(*Id.*, p. 76) Thus, apportionment, not proximate cause, was the nub of Petitioners' appeal. Petitioners' representation to this Court that it "did not appeal from the failure of the trial court to charge the jury on apportionment" (Pet. 34-35, n. 12) is simply false.

Also false is Petitioners' representation that "it did not seek an apportionment charge" (*Id.*): the documents in Petitioners' own Appendix show plainly that it did. (App. 176a ["Damages – Pre-Existing Injuries"]; 186a-191a) However, the requested apportionment charge was erroneous, as it would incorrectly have placed the burden of proof on Respondent.

The burden of proof on apportionment of damages was squarely on Petitioners. In *Maurer v. United States*, 668 F.2d 98 (2d Cir. 1981), an action by a seaman under the Public Vessels Act for injuries resulting from an unseaworthy shipboard condition, the Second Circuit held:

> ...[W]hen a plaintiff is incapacitated or disabled prior to an accident, the defendant is liable only for the additional harm or aggravation that he caused. [cit.om.] Second, when a plaintiff has a preexisting condition that would inevitably worsen, a defendant causing subsequent injury is entitled to have the plaintiff's damages discounted to reflect the proportion of damages that would have been suffered even in the absence of the subsequent injury, but *the burden of proof in such cases is upon the*

> *defendant to prove the extent of the damages that the preexisting condition would inevitably have caused.*

Maurer, 668 F.2d at 100 (emphasis added). In *Ahlf v. CSX Transportation, Inc.*, 386 F.Supp.2d 83 (N.D.N.Y. 2005), an FELA case, the court similarly held:

> *Defendant has the burden of proving that Plaintiff had a pre-existing condition. See Maurer v. United States ...; Stevens v. Bangor & Aroostook R.R. Co.*, 97 F.3d 594, 603 (1st Cir. 1996). *As a result, if the jury was unable to separate the pain and disability caused by the preexisting condition, then the jury should be instructed to hold Defendant liable for all of Plaintiff's injuries.*

Ahlf, 386 F.Supp. 2d at 91 (emphasis added). In *Stevens v. Bangor & Aroostook R.R. Co.* – the very case Petitioners relied on (App. 190a) -- the First Circuit held that in light of FELA's broad remedial purposes (a consideration equally applicable to the Jones Act), "if the factfinder cannot separate injuries caused or exacerbated by the accident from those resulting from a pre-existing condition, the defendant is liable for all such injuries." *See, Stevens*, 97 F.3d at 601-603.

Respondent proffered an apportionment charge which correctly placed the burden of proof where it belonged – on Petitioners. (App. 166a-167a) Evidently unwilling to shoulder its burden,

Petitioners would not accept this charge and never excepted to the resulting absence of an apportionment charge. (App. 120a-123a, 146a-147a) Under the circumstances, the New York Appellate Division correctly held that Petitioners "failed to preserve their current argument now advanced before us that Supreme Court erred in declining to give *any* charge on the issue of apportionment, without regard to the burden of proof (*see Hunt v Bankers & Shippers Ins. Co. of N.Y.*, 50 NY2d 938, 940 [1980]...)." (App. 20a)

F. Conclusion

In view of the foregoing, the case at bar is plainly not an appropriate vehicle for reexamining the question of the standard of causation under the Jones Act, wherefore the petition for certiorari should be denied.

II. PETITIONERS HAVE NOT PRESENTED COMPELLING REASONS TO REEXAMINE THE LONGSTANDING AND NEARLY UNIVERSAL CONSENSUS OF THE COURTS THAT THE FELA AND JONES ACT ESTABLISH A RELAXED STANDARD OF CAUSATION

It is and for decades has been settled law that the FELA and Jones Act displaced traditional common law formulations of proximate cause and established a substantially relaxed standard of causation: a seaman, like Respondent, may recover when his employer's negligence played "any part, even the slightest, in producing the injury or death for which damages are sought." The rule derives from

this Court's construction of the statutorily-imposed liability for injury "resulting in whole or in part" from an employer's negligence in FELA and Jones Act cases. *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957) (FELA); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957) (Jones Act). It is firmly ensconced in subsequent decisions of this Court and in the decisions of every federal circuit court of appeals.

In a newly minted argument, never ventured at trial or in the Appellate Division, Petitioners builds a house of cards on the suggestion of Justice Souter, *concurring* in *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158 (2007), that this longstanding bedrock rule of Jones Act / FELA causation may have been based on a misunderstanding of what this Court meant in *Rogers*. As shown below, Petitioners have not presented compelling reasons to reexamine the nearly universal consensus of the courts that the FELA and Jones Act establish a relaxed standard of causation.

A. Supreme Court Decisions

In decisions spanning five decades, this Court has interpreted Congress' language in the FELA and Jones Act as having displaced traditional common law formulations of proximate cause and established a relaxed standard on the issue of causation.

In *Coray v. Southern Pacific Co.*, 335 U.S. 520 (1949), this Court rejected the state court's "distinctions between 'proximate cause' in the legal sense, deemed a sufficient cause to impose liability,

and 'cause' in the 'philosophical sense,' deemed insufficient to impose liability" under the FELA. *Id.* at 523.

> The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretive purposes. The statute declares that railroads shall be responsible for their employees' deaths "resulting in whole or in part" from defective appliances such as were here maintained.

Id. at 524.

In *Rogers*, this Court rejected the application in FELA cases of the "language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury", and held:

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the

> employee's contributory negligence.... The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or in part" to its negligence.

Id., 352 U.S. at 505-507.

In *Crane v. Cedar Rapids & Iowa City Railway Co.*, 395 U.S. 164 (1969), this Court, in determining whether the defense of contributory negligence was available to a railroad sued by a non-employee, observed that an FELA plaintiff "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's violation of the Act." *Id.* at 166.

Finally, in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), this Court, in addressing the question whether recovery for intentional infliction of emotion distress is available under the FELA, broadly interpreted its holding in *Rogers*:

> We have liberally construed FELA to further Congress' remedial goal. For example, we held in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500.. (1957), that a relaxed standard of causation applies under FELA.

Id. at 542.

In *Norfolk Southern Railway Co. v. Sorrell*, *supra*, and very recently in *Norfolk Southern*

Railway Co. v. Jordan, –U.S.–, 130 S.Ct. 2094 (Apr. 19, 2010), this Court declined to reexamine the question of the proper standard of causation under the FELA. Concurring in *Sorrell*, Justice Ginsburg observed that this standard "is long settled, we have no cause to reexamine it." *Id.*, 549 U.S. at 177. Upon a review of the authorities cited above, she concluded that "*Rogers* describes the test for proximate causation applicable in FELA suits. That test is whether 'employer negligence played any part, even the slightest, in producing injury or death for which damages are sought.'" *Id.*

B. The Federal Circuits All Interpret The FELA And Jones Act As Having Displaced Traditional Formulations Of Proximate Cause And Established A Relaxed Burden Of Proof On Causation

In *McBride v. CSX Transportation, Inc.*, 598 F.3d 388 (7th Cir. 2010), the Seventh Circuit conducted an exhaustive review and analysis of the authority bearing on the question of causation in FELA cases, concluding that "traditional formulations of proximate cause have no role in FELA cases", and that "[t]he idea that *Rogers* relaxed the proximate cause requirement has been echoed by every other court of appeals." *Id.* at 398-400. While there is some disagreement on the precise meaning of *Rogers*, all of the federal courts of appeal read *Rogers* as making, in effect, the same broad statement that this Court made in *Gottshall*, to wit, that "a relaxed standard of causation applies under FELA." 512 U.S. at 542.

1. First Circuit

In *Toucet v. Maritime Overseas Corp.*, 991 F.2d 5 (1st Cir. 1993), the First Circuit held:

> A plaintiff's burden of proving causation under the Jones Act is "featherweight." [cit.om.] Liability exists if the employer's negligence contributed even in the slightest to the plaintiff's injury.

Id., at 10. The First Circuit has approved a Jones Act jury instruction phrased in essentially the same terms used by the trial court here:

> Under the law the defendant's negligence is a legal cause of any injury or damage if that negligence played *any part, no matter how small,* in bringing about or causing the injury or damage. Therefore, even if the defendant's negligence operated *in combination with the act of another or in combination with some other cause,* the defendant's negligence is a legal cause of the plaintiff's injury or damage if it played any part no matter how small in bringing about or causing the injury or damage.

Hopkins v. Jordan Marine, Inc., 271 F.3d 1, 4 (1st Cir. 2001). See also, *Moody v. Maine Cent. R.R. Co.*, 823 F.2d 693, 695 (1st Cir. 1987).

2. Second Circuit

The Second Circuit has repeatedly held that the relaxed standard of causation articulated in *Rogers* – i.e., that the plaintiff need prove only that his employer's negligence played *any part, even the slightest, in producing the injury* for which damages are sought – is applicable to FELA and Jones Act cases. *See, Wills v. Amerada Hess Corp.*, 379 F.3d 32, 47 n.8 (2d Cir. 2004) ("The Jones Act incorporated FELA by reference. Under both statutes, the plaintiff bears a reduced burden of proof with respect to causation."); *Williams v. Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999); *Nicholson v. Erie R.R.*, 253 F.2d 939, 940 (2d Cir. 1958) (under the FELA, "negligence need not be the proximate cause of the injury. The FELA has its own rule of causation. The injury need only be one 'resulting in whole or in part' from the negligence).

In *DeLima v. Trinidad Corporation*, 302 F.2d 585 (2d Cir. 1962), the Second Circuit squarely held that a Jones Act plaintiff was entitled to have the jury instructed on the element of causation in accordance with *Rogers*, and reversed a defendant's verdict because the trial court had charged instead in proximate cause language akin to that requested by Petitioners in this case. The *DeLima* Court wrote:

> Plaintiff also asserts the trial court's denial of his requested charge on proximate cause as to his Jones Act claim was error. *Plaintiff requested the court to charge that if the employer's negligence 'played any part, even the*

> *slightest, in producing an injury to plaintiff, the plaintiff may recover.***' The Court, however, gave the traditional common law instruction that 'Proximate cause is that cause which in the natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of, and without which it would not have occurred.'* Since the language of the requested charge was taken directly form *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506 ..., a decision which reflects the Supreme Court's view that the Federal Employers' Liability Act, 45 U.S.C. 51 et seq. and the Jones Act are departures from traditional common law principles, we believe the requested charge should have been given. See also *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 ...

Id. at 587-588 (emphasis added).

3. Third Circuit

The Third Circuit has construed *Rogers* as "recogniz[ing] that the common law notions of proximate cause are not applicable in [FELA] cases". *Ely v. Reading Company*, 424 F.2d 758, 762 (3d Cir. 1970). It accordingly held, in *Hoyt v. Central Railroad*, 243 F.2d 840 (3d Cir. 1957), that it was reversible error to charge the jury, in language akin to that requested by the defendants here, that it was the plaintiff's burden to prove proximate cause in the

sense of the "direct cause, that which produces a result without any interfering or intervening cause." *Id.* at 843. *See, Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267 (3d Cir. 1991).

4. Fourth Circuit

The Fourth Circuit, in *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432 (4th Cir. 1999), held that "to prevail on a Jones Act negligence claim against his employer, a seaman must establish...causation to the extent that his employer's negligence was the cause "in whole or in part" of his injury...[T]o further the remedial goals of the FELA, and derivatively the Jones Act, the Supreme Court has relaxed the standard of causation by imposing employer liability whenever "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." [quoting *Gottshall*, 512 U.S. at 543]. *Id.* at 436. *See, Brown v. Baltimore & Ohio R.R. Co.*, 805 F.2d 1133, 1137 (4th Cir. 1986).

5. Fifth/Eleventh Circuit

In *Page v. St. Louis Southwestern Railway Company*, 312 F.2d 84 (5th Cir. 1963), the Fifth Circuit held that it is error to instruct the jury as Petitioners requested here in the traditional language of common law proximate cause:

> *Under the definition of proximate cause in this case, the jury was required to find, before the plaintiff could prevail, that the cause of his injury was one*

> *which in natural and continuous sequence produced the event or happening in question and without which such event or happening would not have occurred.* A detailed consideration of those requirements would seem to indicate that they are not essential to the jury's conclusion in this case that employer negligence played a part in producing the plaintiff's injury. The same thing would appear to be true of the requirement that the accident be the natural and probable consequence of defendant's act or omission and such a consequence as ought to have been foreseen by a person in the exercise of ordinary care in the light of attending circumstances. *Those requirements may well have been injurious to the plaintiff. They are foreign to the simple test prescribed in Rogers, supra. Under that decision, and the long line of Supreme Court cases which have followed it, we must hold that the court's instructions on proximate causation were erroneous in operating to unduly restrict the jury in the exercise of its functions.*

Id. at 92 (emphasis added). *See, Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997)(*Rogers* used term "slightest" to "describe the reduced standard of causation between the employer's negligence and the employee's injury" in FELA cases); *Thibodeaux v. Tex. E. Transmission Corp.*, 548 F.2d 581, 587 n. 12 (5th Cir. 1977).

6. Sixth Circuit

In *Hausrath v. New York Central R.R. Company*, 401 F.2d 634 (6th Cir. 1968), the Sixth Circuit reversed a defendant's verdict in an FELA case where the jury had been charged that the plaintiff had to prove that the defendant's negligence was "the direct and proximate cause" of his sickness. *Id.*, at 636, 638. The Court wrote:

> The proceeding currently under review, however, is brought under *a federal statute [FELA] wherein Congress deliberately adopted a negligence standard different from that of the common law. The phrase "resulting in whole or part" was obviously designed to make even more explicit that negligence of an employer did not have to be the sole cause or "the proximate cause" of the injury in order to justify recovery.*
>
> ...[S]ince Congress has deliberately established a more protective principle for railroad employees than that of the common law, *it is reversible error for a judicial charge to fail to employ and emphasize both the "in whole or in part" causal language of the statute and the interpretive language of the Supreme Court in the Rogers case.*

Id. at 637, 638 (emphasis added). See, *Richards v. Consolidated Rail Corp.*, 330 F.3d 428, 433-434 (6th Cir. 2003).

7. Seventh Circuit

In *McBride v. CSX Transportation, Inc.*, *supra*, the Seventh Circuit reaffirmed its longstanding view that common law proximate causation is not required to establish liability under the FELA, and held that the jury was properly instructed in the language of this Court's words in *Rogers*. *Id.*, 598 F.3d at 406. *See, Holbrook v. Norfolk Southern Railway Co.*, 414 F.3d 739, 741-742 (7th Cir. 2005); *Lisek v. Norfolk & Western Railway Co.*, 30 F.3d 823, 831-832 (7th Cir. 1994); *Eglsaer v. Scandrett*, 151 F.2d 562, 565-566 (7th Cir. 1945).

8. Eighth Circuit

The Eighth Circuit, in *Fletcher v. Union Pacific R.R. Co.*, 621 F.2d 902 (8th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981), held that "[t]he test of causation under the FELA is whether the railroad's negligence played any part, however small, in the injury which is the subject of the suit." *Id.* at 909. *See, Nordgren v. Burlington N. R.R. Co.*, 101 F.3d 1246, 1249 (8th Cir. 1996).

9. Ninth Circuit

In *Oglesby v. Southern Pacific Transportation Co.*, 6 F.3d 603 (9th Cir. 1993), the Court held that "it was not prejudicial error for the court to refuse to instruct the jury that the [] violation was the

proximate or direct cause of the injury. This holding is consistent with the case law of several other circuits which have found [that] "proximate cause" is not required to establish causation under the FELA." *Id.* at 609. *See, Mullahon v. Union Pac. R.R.*, 64 F.3d 1358, 1363-64 (9th Cir. 1995); *Ellison v. Shell Oil Co.*,882 F.2d 349, 353 (9th Cir. 1989); *Taylor v. Burlington N. R.R.*, 787 F.2d 1309, 1313 (9th Cir. 1986).

10. Tenth Circuit

The Tenth Circuit, in *Summers v. Missouri Pacific Railroad System*, 132 F.3d 599 (10th Cir. 1997), observed that this Court in *Rogers* had "definitively abandoned" proximate cause analysis under the FELA, and that "several circuits have held that it is reversible error for a district court to instruct the jury in a FELA case as to causation using traditional common law concepts rather than the standard imposed by the statute." *Id.*, at 606, 607. It held that:

> A jury instruction containing both the statutory language and the explanatory language of *Rogers* is certainly the clearest articulation of the appropriate causation standard and presents the preferable approach in the future.

Id., at 607.

C. The Purported Conflict Among A Few State Courts Is Not Meaningful

In *McBride v. CSX Transportation, Inc.*, *supra*, the Seventh Circuit reviewed the state caselaw that Petitioners here cite as evidence of a split in authority over the standard of causation in FELA / Jones Act cases, and concluded to the contrary that several of those states [i.e., Iowa, Minnesota, Ohio and Nebraska] "do not require FELA plaintiffs to establish 'proximate cause,' that is a 'direct relation between the injury asserted and the injurious conduct alleged.'" *Id.*, 598 F.3d at 404 n.7.

Most of the cases which supposedly insist on "proximate cause" cite *Rogers* as the standard by which "proximate cause" is measured. In *Snipes v. Chicago & Pacific Railroad Co.*, 484 N.W.2d 162, 164-165 (Iowa 1992), the court stated that an FELA plaintiff must prove that "the negligence proximately caused, *in whole or in part*, the accident," and, quoted *Rogers'* "even the slightest" language to show "[t]he liberality with which the Supreme Court has applied this test." In Minnesota, Ohio and Nebraska, appellate cases relying on *Rogers* likewise hold that FELA claims are subject to a less stringent causation requirement than common-law claims. *See, Hager v. Norfolk & W. Ry. Co.*, 2006 WL 3634373 at *5 (Ohio App., Dec. 14, 2006); *Crafton v. Union Pac. R. Co.*, 585 N.W.2d 115, 123 (Neb.App. 1998) ("The common-law standard of proximate cause is not applicable to FELA."); *Narusiewicz v. Burlington N.R. Co.*, 391 N.W.2d 895, 898-899 (Minn.App. 1986). The Montana and West Virginia cases, like *Snipes*, *supra*, characterize the FELA causation requirement not as

traditional proximate cause but as proximate cause "*in whole or in part*" – a concept which, as noted above, was omitted entirely from Petitioners' requested jury instructions on causation. *Marazzato v. Burlington N.R. Co.*, 817 P.2d 672, 675 (Mont. 1991); *Gardner v. CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W.Va. 1997) (expressly declaring that *Rogers* "established" "[t]he causation standard in FELA cases"). In any event, in neither *Marazzato* nor *Gardner* was causation the issue: *Marazzato* turned on foreseeability (*Id.*), and *Gardner* turned on negligence (*Id.* at 501).

In *Raab v. Utah Ry. Co.*, 221 P.3d 219 (Utah 2009), the court adopted Justice Souter's *Sorrell* concurrence, but what it said it was rejecting was not a relaxed standard of causation, but the notion that only "but for" causation is required. *Id.* at 228-230 ¶¶ 32, 35, 37. Moreover, the court applied what can only be described as a relaxed standard of causation. In *Raab*, a defective brake forced replacement of the lead locomotive, which required plaintiff to enter a trailing locomotive to set controls, where he hit his head on a low hanging air conditioner. The court held that the jury was entitled to find that the defective brake was "a proximate cause" of plaintiff's injury. *Id.* at 231. Finally, the *Raab* court's definition of the FELA standard of causation is technically *dicta*: since the plaintiff's evidence was deemed sufficient to establish "proximate cause," it was unnecessary for the court, in resolving the issue before it, to decide whether FELA in fact requires traditional proximate cause or establishes a more relaxed standard of causation. Regardless of which standard applies, the

defendant's motion for summary judgment had to be denied.

There is, in short, not disagreement but essential unanimity. The standard by which causation is measured in FELA / Jones Act cases is, compared with traditional common law proximate cause, a relaxed standard. Petitioners have presented no basis for this Court to conclude that any differences in emphasis or phraseology in the opinions have resulted in divergent outcomes, administrability problems, unfairly disparate results in different forums, or any other adverse consequences.[2] In short, neither *Sorrell* nor any of Petitioners' caselaw warrants this Court's reexamining and overturning longstanding FELA / Jones Act jurisprudence on causation.

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[2] Petitioners' other cases are inapposite. *Mosley v. Cia. Mar. Adra, S.A.*, 314 F.2d 223 (2d Cir. 1963) concerns the *unseaworthiness* of the vessel or its appliances under general maritime law, and is no authority on the standard of causation in Jones Act cases. *Id.* at 227-228. *Vickers v. Chiles Drilling Co.*, 822 F.2d 535 (5th Cir. 1987) similarly concerns a claim (against a manufacturer) under general maritime law, not under the Jones Act. *Id.* at 537-540. *Wharf v. Burlington N. R.R.*, 60 F.3d 631 (9th Cir. 1995) does not address proximate cause, but rather which of multiple possible causes was the cause of the plaintiff's loss of earnings. *Id.* at 639. The issue in *Baker v. Baltimore & O.R. Co.*, 502 F.2d 638 (6th Cir. 1974) was mitigation of damages, *id.* at 644, as to which the defendant, not plaintiff, bears the burden of proof. *See, Jones v. Consolidated Rail Corp.*, 800 F.2d 590, 593-594 (6th Cir. 1986).

D. Congress' Longstanding Acquiescence In The Courts' Interpretation Of The FELA And Jones Act As Establishing A Relaxed Standard Of Causation Militates Heavily In Favor Of Respecting This Now Well Established Authority Under The Principles Of *Stare Decisis* And Against Adopting A Common Law Formulation Of Proximate Cause

This Court has recognized that "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Pearson v. Callahan*, –U.S.–, 129 S.Ct. 808, 816-817 (2009) (quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977)). In the wake of *Rogers* and circuit law which has uniformly interpreted the FELA and Jones Act as having established a relaxed standard of causation, Congress has not seen fit to amend these statutes to clarify or correct the standard of causation applied by the courts almost universally for several decades. Accordingly, the principles of *stare decisis* militate heavily in favor of respecting this now well-established authority and against adopting a common law formulation of proximate cause in FELA and Jones Act cases. *See, McBride v. CSX Transportation, Inc.*, 598 F.3d 388, 406 (7th Cir. 2010).

III. RESPONDENT'S MARITIME EXPERT PROPERLY CONSIDERED THE SAFETY CONSIDERATIONS UNDERLYING THE ANSI A14.3 STANDARD PERTAINING TO FIXED LADDERS IN OPINING THAT PETITIONERS VIOLATED COAST GUARD REGULATION 46 CFR 42.15-75(d)

An employer's violation of a Coast Guard regulation enacted for the safety of seamen constitutes negligence *per se* under the Jones Act. *Kernan v. American Dredging Co.*, 355 U.S. 426, 430-431, 439 (1958). Courts faced with the issue have uniformly held that a shipowner's violation of Coast Guard Regulation 46 CFR 42.15-75(d) is a valid predicate for a finding of negligence *per se* under the Jones Act. *See, Wuestewald v. Foss Maritime Company*, 319 F.Supp.2d 1002, 1008 (N.D. Cal. 2004); *Pilare v. Matson Navigation Company*, 2006 WL 3533030 at *2 (N.D. Cal. 2006).

Respondent's maritime expert, David Cole, made a detailed demonstration that Petitioners violated Section 42.15-75(d), entitled "Protection of the crew", which provides:

> Satisfactory means (in the form of guard rails, life lines, gangways or underdeck passages, etc.) shall be provided for the protection of the crew in getting to and from their quarters, the machinery space and all other parts used in the necessary work of the vessel.

Mr. Cole's affidavit demonstrated that:

> The fixed ladder attached to the deckhouse bulkhead did not provide satisfactory means for the protection of the crew in getting to and from the deckhouse roof in the necessary work of the RTC 502. Ascending and especially descending the ladder was awkward and unsafe because the grab bar did not extend to a sufficient height above the deckhouse roof, and the top rung of the ladder was too far below the edge of the roof. In addition, there was an unsafe *de facto* handrail running inside the ladder rungs on the right side of the ladder and extending above the deckhouse roof. This *de facto* handrail, consisting of a beige pipe into the top of which was fitted a black pole that formerly held an antenna, constituted a trap, for (a) the black pole was readily accessible and available to be used as a handhold, but (b) this *de facto* handrail was unsafe in that (i) the means by which the black pole was connected into the beige pipe was not sufficiently secure, and (ii) the connecting parts of the *de facto* handrail were negligently maintained and in a corroded state at the time of the accident.

(App. 60a-61a)

Petitioners erroneously asserts that Mr. Cole opined that Petitioners were negligent *per se* for violating the ANSI A14.3 standard for fixed ladders. Instead of addressing the opinion actually proffered by Mr. Cole, Petitioners attack a straw man of their own devising. Contrary to Petitioners' suggestion, Mr. Cole *never* ventured the opinion that ANSI A14.3 was legally binding or that Petitioners w negligent *per se* for violating ANSI standards. (App. 65a-72a, 104a-110a) Mr. Cole relied on the *safety concerns underlying the cited ANSI requirements* and made an *unrefuted* demonstration that:

(A) ANSI A14.3 is "authoritative with regard to proper and safe design of fixed ladders."

(B) *"The safety concerns underlying the cited ANSI requirements are fully applicable, and are if anything exacerbated, in the marine context present here.* Since the RTC 502 operates on the open sea, seamen ascending and descending the deckhouse ladder are potentially subject to destabilizing forces created by the motion of the sea, and also to the effects of inclement weather, and therefore to an enhanced risk of loss of balance and falling."

(C) The stated purpose of ANSI A14.3 is "to provide safety for life, limb, and property by establishing *minimum*

standards for the design and installation of fixed ladders."

(D) There was not just a technical violation of the cited ANSI requirements pertaining to handrails/grab bars and ladder rungs. The height of the horizontal grab bar affixed to the RTC 502's deckhouse roof was *so substantially below* the ANSI requirement (*Id.*, 68a), and the distance of the top rung of the ladder below the level of the roof was *so substantially greater* than allowed by ANSI A14.3 (*Id.*, 69a), that the *deckhouse ladder failed of its fundamental purpose of providing a safe and convenient means of mounting the ladder so as to descend from the deckhouse roof to the main deck of the barge.*

(E) On account of the ladders deficiencies, *seamen were forced to employ an awkward and unsafe procedure* in descending from the deckhouse roof to the main deck of the barge.

(F) To avoid this, it was "perfectly natural and indeed practically inevitable that seamen would regard the beige support pipe/black pole structure running vertically inside the rungs of the ladder" – near where a proper handrail or vertical grab bar would have been located – as *a de facto handrail.*

> However, for the very reason that it was so readily available and accessible as a handhold, *the antenna pole structure "constituted a trap, since the means by which the black pole was connected into the beige pipe was not sufficiently secure, and the connecting parts of this de facto handrail were negligently maintained and in a corroded state at the time of the accident."*
>
> (G) Under these circumstances, ANSI A14.3 is "*relevant to a determination under* 46 CFR 42.15-75(d) whether the fixed ladder in question here provided 'satisfactory means ... for the protection of the crew' in getting to and from the deckhouse roof."

(App. 66a, 69a-71a, 108a-110a)

Thus, as New York Supreme Court correctly observed, Mr. Cole "did not opine that the ANSI standards were legally binding", but properly considered the safety considerations underlying ANSI A14.3 as "a factual predicate for his opinion." (App. 31a) The New York Appellate Division likewise correctly observed, "Cole did not opine that defendants were negligent per se because they violated ANSI requirements; rather, he stated that the ANSI guidelines are relevant to his determination of whether the ladder provided 'satisfactory means' of access within the meaning of 46 CFR 42.15-75(d)." (App. 14a n.4) In response, as Supreme Court again correctly observed, Petitioners' expert ventured "a

bare, conclusory opinion that the ladder was suitable for its purpose", without a scintilla of supporting evidence, and "does not even mention" the existence or failure of the pole that Mr. Cole demonstrated to be the deckhouse ladder's *de facto* handrail. (App. 32a, 82a)

Petitioners' further claim that 46 CFR 42.15-75(d) is insufficiently specific to support a finding of negligence *per se* is an afterthought, never raised in response to the Respondent's motion for summary judgment and hence unpreserved for review. That is hardly surprising, as the caselaw uniformly holds that a violation of Section 42.15-75(d) may support a finding of negligence *per se* under the Jones Act. *See, Wuestewald v. Foss Maritime Company, supra*, 319 F.Supp.2d at 1008; *Pilare v. Matson Navigation Company, supra*, 2006 WL 3533030 at *2-4.

To be sure, very general regulations which, boiled down, say nothing more than "be safe" and "avoid hazards", may not support a finding of negligence *per se* under the Jones Act. *See, e.g., Wilson v. Maersk Line, Limited*, 2007 WL 3085436 at *2 (S.D.N.Y., Oct. 18, 2007) (safety management system must "[p]rovide for safe practices in vessel operation and a safe work environment onboard..."). In contrast with the regulation in *Wilson*, 46 CFR 42.15-75(d) (a) governs a specific situation, i.e., "the protection of the crew in getting to and from their quarters, the machinery space and all other parts used in the necessary work of the vessel"; and (b) prescribes with ample particularity the means required for such protection, i.e., "[s]atisfactory means (in the form of guard rails, life lines, gangways

or underdeck passages, etc.)". Petitioners' quarrel with the regulatory term "satisfactory" is misplaced. In *Fuszek v. Royal King Fisheries, Inc.*, 98 F.3d 514 (9th Cir. 1996), for example, the Court held the defendant negligent *per se* based on its violation of a comparable regulation, 46 CFR 28.215, employing the analogous term "suitable", which required that "suitable hand covers ... must be installed in way of machinery which can cause injury to personnel." *Id.*, at 516-517.

The shipowner's failure to provide *any* instrumentality for the protection of the crew as required by Section 42.15-75(d) would incontestably amount to the violation of a clear and specific regulatory command; that, in essence, is what *Wuestewald, supra*, holds. *Id.*, 319 F.Supp.2d at 1008. It is no less a violation of the clear and specific command of Section 42.15-75(d) where, as here, a *defective instrumentality fails* and causes injury. That is precisely what Respondent's expert demonstrated in this case.

In sum, the New York courts' finding that Petitioners violated 46 CFR 42.15-75(d) and were negligent *per se* was eminently correct. This Court's review is unwarranted.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

James Alexander Burke
LARKIN, AXELROD, INGRASSIA
& TETENBAUM, LLP
356 Meadow Avenue
Newburgh, New York 12550
(845) 562-3366

Counsel for Respondent